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IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *ET AL.*,

Petitioners,

v.

GREG MANNING, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization with members and supporters nationwide. Since its founding in 1971, Public Citizen has appeared on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and has worked for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting the jurisdiction of the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen attorneys have therefore frequently represented parties or amici before this Court in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[2]

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

[2] *See, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Will v. Hallock*, 546 U.S. 345 (2006).

SUMMARY OF ARGUMENT

The question posed by this case is not whether section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, is a jurisdictional statute, but whether the federal question jurisdiction it confers sweeps more broadly than that granted by the general federal-question jurisdiction statute, 28 U.S.C. § 1331, over cases arising under the laws of the United States.

This Court has long construed § 1331's broad grant of federal question jurisdiction to comprehend virtually all actions asserting rights of action created by federal law. At the same time, the Court has construed § 1331's grant of jurisdiction to include only a few exceptional cases outside those bounds. That small category of cases encompasses only actions in which the plaintiff's well-pleaded complaint reveals that its affirmative claims necessarily depend on a substantial, disputed issue of federal law that requires a federal forum. See *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013). In this case, the lower courts have held that the claims fall outside § 1331, and Merrill Lynch does not challenge those rulings here.

The Exchange Act's jurisdictional provision does not command a different result. The provision, in language also used in a handful of other statutes, provides for jurisdiction over actions seeking to "enforce any liability or duty created by this [Act]." Those words, read in light of their natural meaning and this Court's longstanding reluctance to give overbroad readings to jurisdictional grants, are no broader than those of § 1331's grant of jurisdiction over cases "arising under" federal law. Indeed, this Court held more than fifty years ago that the language used in the Exchange Act provision is congruent with § 1331's "aris-

ing under" standard. *See Pan Am. Petroleum Corp. v. Super. Ct.*, 366 U.S. 656 (1961). Merrill Lynch offers no reason for overturning that reading.

The Exchange Act's grant of jurisdiction over "violations" likewise is not a font of expansive jurisdiction: Its natural meaning and effect is to provide jurisdiction over enforcement and criminal actions seeking statutory penalties for violations and over actions brought to enjoin violations of federal law. It is not a source of jurisdiction over damages actions, *see Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21–22 (1979), let alone damages actions based on state law.

Nor does the statute's grant of "exclusive" jurisdiction call for a broader construction. The Exchange Act's jurisdictional provision defines the scope of federal jurisdiction in terms identical to other statutes that grant non-exclusive jurisdiction to federal courts. The meaning of those terms does not vary depending on whether they are incorporated in a statute that makes the resulting jurisdiction exclusive. "Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction ...." *Pan Am. Petroleum*, 366 U.S. at 664. Merrill Lynch's policy arguments about the need for uniform interpretation of federal law are no more persuasive than those that have been advanced and rejected by other litigants seeking expansive readings of statutes granting exclusive jurisdiction. *See, e.g., Gunn*, 133 S. Ct. at 1067–68.

ARGUMENT

I. This Court has long limited statutory grants of federal question jurisdiction to cases in which federal law creates the right of action and to a small category of exceptional cases presenting claims that necessarily rest on substantial questions of federal law.

Article III of the Constitution grants Congress broad power to confer on the federal courts jurisdiction over cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const., art. III, § 2, cl. 1. Although the outer limits of that power are untested, this Court's decision in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983).

For most of the first century under the Constitution, Congress declined to exercise its authority to confer sweeping federal question jurisdiction on the federal courts, and instead granted the federal courts relatively narrow authority over particular types of federal claims. Beginning in 1875, however, Congress broadly granted federal trial courts jurisdiction—in terms mirroring those used in Article III—over cases "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." Jurisdiction & Removal Act of 1875, ch. 137, § 1, 18 Stat. 470. That jurisdictional

grant, the forerunner of today's general federal-question jurisdictional statute, 28 U.S.C. § 1331, ushered in an era in which deciding cases based on federal law has increasingly come to be seen as a preeminent task of the federal court system.

For much of that new era, until the elimination of § 1331's amount-in-controversy requirement in 1980, *see* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369, more specific grants of federal question jurisdiction over cases involving particular areas of federal law, without amount-in-controversy limits, supplemented § 1331 by conveying more expansive authority over areas where Congress thought that the availability of a federal forum was particularly important. In some instances, moreover, statutes granted exclusive federal jurisdiction over cases arising under particular types of federal law.

Although Congress used broad language to accomplish the transformation in the business of the federal courts that the ascendancy of statutory federal question jurisdiction has brought about, this Court has never interpreted these statutory jurisdictional grants as sweepingly as Article III would theoretically allow. Rather, the construction of federal-question jurisdictional statutes has been guided by "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

In particular, the Court has been concerned that reading such statutes as broadly as the Constitution's own "arising under" language would "permi[t] 'assertion of original federal question jurisdiction on the

remote possibility of presentation of a federal question.'" *Verlinden*, 461 U.S. at 492 (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting)). Such a broad construction of federal jurisdictional statutes, the Court has recognized, could distort congressional judgments about the proper division of federal- and state-court authority over cases involving issues of federal law. Thus, the Court has "consistently emphasized" that "determinations about federal jurisdiction require sensitive judgment about congressional intent, judicial power, and the federal system." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 810 (1986). The Court has "forcefully reiterated the need for prudence and restraint in the jurisdictional inquiry," *id.*, and construed the scope of statutory grants of federal question jurisdiction "with an eye to practicality and necessity," *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20 (1983), as well as due recognition that expansive assertion of federal question jurisdiction "always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

Applying the broad statutory language of Congress's grants of federal question jurisdiction consistently with these principles of restraint, the Court has identified a solid core of cases almost invariably subject to statutory federal question jurisdiction: "when federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction" unless Congress has acted to divest them of it. *Mims v. Arrow Fin. Servs.*,

LLC, 132 S. Ct. 740, 748–49 (2012). Put more simply, in Justice Holmes's famous aphorism, "A suit arises under the law that creates the cause of action." *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The rule that "a case arises under federal law when federal law creates the cause of action asserted," as this Court recently stressed, "accounts for the vast bulk of suits that arise under federal law." *Gunn v. Minton*, 133 S. Ct. at 1064; *accord, e.g.*, *Merrell Dow*, 478 U.S. at 808; *Franchise Tax Bd.*, 463 U.S. at 9.

Although statutory federal question jurisdiction will almost always exist over a case asserting a right of action created by federal law, the Court has acknowledged that this principle is "more useful for inclusion than for ... exclusion." *Merrell Dow*, 478 U.S. at 809 n.5 (quoting *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964)). The Court has recognized that in some exceptional cases, actions asserting rights of action created by state law that necessarily pose substantial federal-law issues may be deemed to be subject to federal question jurisdiction. *See, e.g.*, *Grable*, 545 U.S. at 314; *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). The circumstances under which such actions may serve as the basis for invocation of federal question jurisdiction, however, have long been carefully limited by this Court.

The Court has insisted, for example, that to give rise to jurisdiction, the existence of a federal question must appear on the face of a well-pleaded complaint. *Franchise Tax Bd.*, 463 U.S. at 9–10. That a federal issue may be implicated by a defense to a right of action—even one that is anticipated in the complaint itself or that serves as the basis for a declaratory

judgment action—does not suffice to allow statutory federal question jurisdiction. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). And it is not enough that a federal question "is lurking in the background" of a case. *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936). "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit"; rather, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Id.* at 115, 112.

The Court has recently crystalized these principles "into the following inquiry: Does the 'state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities'?" *Gunn*, 133 S. Ct. at 1065 (quoting *Grable*, 545 U.S. at 314). "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* The Court emphasized that the set of cases meeting these criteria is "special and small" and that this "slim category" is reserved for "only extremely rare exceptions" to the general rule that a case falls within federal question jurisdiction if federal law created a right of action it asserts. *Id.* at 1064–65.

II. The Securities Exchange Act's jurisdictional provision and similar provisions in other statutes do not confer jurisdiction more broadly than the general federal-question jurisdictional statute.

A. As this case comes before the Court, it has been established that the claims asserted do not meet the *Gunn-Grable* criteria for the invocation of general federal question jurisdiction over state-created rights of action. The Third Circuit so held, and Merrill Lynch neither sought review of that ruling in its petition for certiorari nor contested the issue in its brief on the merits. Rather, Merrill Lynch's sole assertion is that section 27 of the Exchange Act, 15 U.S.C. § 78aa, confers jurisdiction over a broader set of cases that potentially implicate issues of federal law than do 28 U.S.C. § 1331 and other jurisdictional statutes that employ its "arising under" language.

The Exchange Act is one of a small set of statutes, most enacted during the New Deal era, providing federal district-court jurisdiction over "violations of this [Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this [Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). Other examples include:

- the Securities Act of 1933, 15 U.S.C. § 77v(a);
- the Public Utility Holding Company Act of 1935, former 15 U.S.C. § 79y;
- the Federal Power Act of 1935, 16 U.S.C. § 825p;
- the Connally Hot Oil Act of 1935, 15 U.S.C. § 715i(c);
- the Natural Gas Act of 1938, 15 U.S.C. § 717u;

- the Trust Indenture Act of 1939, 15 U.S.C. § 77vvv(b);
- the Investment Company Act of 1940, 15 U.S.C. § 80a-43;
- the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14(a);
- the International Wheat Agreement Act of 1949, 7 U.S.C. § 1642(e);
- and the Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. § 1719.

In addition to their nearly identical language conferring jurisdiction over "violations" as well as "suits in equity and actions at law brought to enforce any liability or duty created by" the relevant federal statute, the provisions were all enacted when the general federal-question jurisdictional statute had a substantial amount-in-controversy requirement, which each of these special jurisdictional provisions lacked. Though the scope of the jurisdiction they describe is identical, the statutes differ in that some (including the Exchange Act, the Federal Power Act, the Hot Oil Act, and the Natural Gas Act) confer "exclusive" jurisdiction on the federal courts, while the rest do not.

Notably, these statutes use a *narrower* definition of the scope of jurisdiction than does 28 U.S.C. § 1331, which tracks the Constitution's sweeping "arising under" language. Merrill Lynch's submission that by using narrower language they confer jurisdiction more broadly than does § 1331 is unusual, to say the least. Contrary to Merrill Lynch's argument, that paradoxical result is by no means compelled by the plain language of these jurisdictional provisions and is

contradicted by this Court's longstanding construction of them.

Merrill Lynch's contention that a statute conferring jurisdiction over actions "brought to enforce any liability or duty created by this Act" sweeps more broadly than § 1331 finds little grounding in the statute's actual words. Particularly when read in light of the Court's "traditional reluctance" to construe jurisdictional statutes broadly, *Romero*, 358 U.S. at 379, the words seem most readily adapted to confer jurisdiction over rights of action created by the federal laws in question—that is, to express the Holmesian view of the scope of statutory federal question jurisdiction as encompassing suits arising "under the law that creates the cause of action." *Am. Well Works*, 241 U.S. at 260. Congress's choice of narrower language than that used in § 1331 to describe the scope of jurisdiction, moreover, may well have stemmed from uncertainty regarding the limits of § 1331's "arising under" jurisdiction in light of this Court's decisions at the time, *compare Gully*, 299 U.S. at 112–13, *with Smith*, 255 U.S. at 199, and an impulse to describe the limits on statutory federal question jurisdiction more precisely.

Not surprisingly, therefore, when this Court has engaged with this jurisdictional language, it has construed it to be congruent with the more limited view of § 1331 that the Court has generally adhered to from *Gully* onward rather than as encompassing a radical expansion of jurisdiction. Thus, in *Pan American Petroleum Corp.*, the Court, construing the identically worded jurisdictional provision of the Natural Gas Act, 15 U.S.C. § 717u, held that a suit invoking a state-created right of action was outside the scope of

federal court jurisdiction, notwithstanding that it might implicate issues under the Natural Gas Act, because the action was "based upon claims arising under state, not federal, law." 366 U.S. at 663.

The Court relied throughout its analysis on cases decided under the general federal-question jurisdiction statute and other statutes employing the standard "arising under" terminology, including *Gully* and *Skelly Oil*, and *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913). And it dismissed as immaterial the difference between the "arising under" language and that used in the Gas Act's jurisdictional provision: It explicitly stated that its reliance on "arising under" precedents was "not affected by want of explicit limitation to jurisdiction 'arising under' the Natural Gas Act. Such limitation is clearly implied ...." *Id.* at 665 n.2.

The Court's opinion in *Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367 (1996), while terser, reflects a similar construction of the jurisdictional language at issue. In *Matsushita*, the Court held that while a state court may not adjudicate claims arising under the Exchange Act, a state-court action may *settle* (with preclusive effect) Exchange Act causes of action subject to exclusive federal jurisdiction under 15 U.S.C. § 78aa(a), as long as the state court properly had jurisdiction over the action in the first instance. *See id.* at 381. In so holding, the Court pointed out that the state-law claims originally filed in state court were not subject to exclusive federal jurisdiction because they were claims "arising under state law" and were thus not "'brought to enforce' any rights or obligations under the Act." *Id.* at 381.

The Court's earlier decision in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), similarly indicates that the jurisdictional language at issue is directed at rights of action arising under federal law. In *Deckert*, the Court considered whether the Securities Act of 1933 created a right of action for rescission and restitution to redress violations of the Act, and whether such an action fell within the jurisdiction granted by the Securities Act's jurisdictional provision, 15 U.S.C. § 77v(a). That provision, in language identical to the relevant terms of the Exchange Act provision at issue here, gives district courts jurisdiction (albeit nonexclusive) over actions "brought to enforce any liability or duty created by this [Act]." In deciding both issues in the affirmative, the Court emphasized that the jurisdiction to "enforce" was "the power to make effective *the right of recovery afforded by the Act*." 311 U.S. at 288 (emphasis added).

This Court's precedents construing the language at issue thus reinforce its most natural reading in light of the Court's traditional approach to construing statutes granting federal question jurisdiction. Far from embracing an adventuresome expansion of jurisdiction far beyond that conferred by § 1331's "arising under" language, the statutory language at issue here reflects an alternative formulation aimed at the same end: bringing within the purview of the federal courts actions asserting rights of action created by federal law and, potentially, a few exceptional cases in which the complaint discloses that a substantial question of federal law is "an element, and an essential one, of the plaintiff's cause of action." *Pan Am. Petroleum*, 366 U.S. at 663 (quoting *Gully*, 299 U.S. at 112–13).

B. The statutory language granting jurisdiction over "violations" does not alter this conclusion. That language is not aimed at bringing within federal jurisdiction any complaint that describes conduct that violates federal law, but is most naturally read to confer jurisdiction over actions seeking the criminal and civil penalties the Act authorizes for violations, as well as actions seeking to enjoin violations.[3]

This construction finds strong support in this Court's decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). There the Court considered whether the Investment Advisers Act of 1940 conferred a private cause of action for injunctive relief or damages. The Court's decision not to find a private damages remedy in the Act rested significantly on construction of its jurisdictional provision, which at the time used language similar to that of the statute at issue here, but with an important variation: It conferred jurisdiction over "violations" and "suits in equity to enjoin any violation," but omitted the language covering "actions at law" to enforce any "liability or duty" created by the Act. *See* 444 U.S. at 21–22 & n.11.[4] Concluding that the jurisdiction over

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[3] This construction is reinforced by the fact that almost all of the statutory provisions containing the language at issue are headed "Jurisdiction of offenses and suits." "Offenses" itself is a term that is generally limited to criminal matters. *See Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1976–77 (2015). The operative terms of these statutory provisions use the broader term "violations," but the use of the narrower term in the title provides important context suggesting that the intended meaning is actions seeking the civil and criminal penalties created by the statutes for violations.

[4] The Advisers Act was subsequently amended in 1990 so that its jurisdictional provision, 15 U.S.C. § 80b-14, like that of

(*Footnote continued*)

"violations" would not itself encompass an action at law for damages, the Court held that the absence of a grant of jurisdiction over such actions suggested that Congress had not intended to create them. *See id.* If, as Merrill Lynch now argues, jurisdiction over "violations" itself broadly included jurisdiction over damages actions alleging violations, the Court could not have drawn the inference that it drew regarding congressional intent.

Thus, neither the grant of jurisdiction over "violations" nor that over actions to enforce any "liability or duty created by the Act" suggests an intent to sweep within federal jurisdiction state-law rights of action that implicate potential violations of federal law but do not meet the criteria for arising-under jurisdiction stated in *Gunn*, *Grable*, and the earlier case law on which they are based. Such a reading by no means strips the jurisdictional provisions of the Exchange Act and similar statutes of meaning or effect. At the time these statutes were passed, the general federal-question jurisdictional grant had a substantial amount-in-controversy requirement, which increased still further in later decades before its ultimate abolition. *See Mims*, 132 S. Ct. at 747–48 & n.7. The statutes employing the language used here, by contrast, lacked jurisdictional amounts, *see Deckert*, 311 U.S. at 289–90, and thus were far from superfluous in light of the existing statutory grant of general federal question jurisdiction.

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the other statutes discussed in this brief, now covers not only "violations" and equitable suits, but also legal actions seeking to enforce "any liability or duty" created by the Act. *See* Pub. L. No. 101-429, § 401, 104 Stat. 931 (1990).

C. The Exchange Act, of course, also has the additional consequence of making the jurisdiction it describes exclusive. Contrary to Merrill Lynch's suggestion, however, the exclusivity of the jurisdiction does not imply a broader scope. This Court made exactly that point in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), where it rejected the view that 28 U.S.C. § 1338(a)'s grant of jurisdiction over cases arising under the patent laws is broader than § 1331's general grant of federal question jurisdiction merely because it is exclusive. Because both statutes define the scope of jurisdiction using the same language, "linguistic consistency" demands that they be given the same limits. *See id.* at 808–09. Thus, cases under § 1338(a), like those under § 1331, are subject to the well-pleaded complaint rule and limited to rights of action created by federal law and the small category of exceptional cases that meet the criteria laid out in *Grable* and *Gunn*. *See Gunn*, 133 S. Ct. at 1064.

Likewise, policy arguments based on the exclusive nature of the jurisdiction play no role in determining the scope of jurisdiction conferred by the Exchange Act, as exactly the same language is used to define the scope of *non-exclusive* jurisdiction conferred by other statutes. The language at issue (conferring jurisdiction over "violations of this Act" and suits and actions "to enforce any liability or duty created by this Act") is used to confer exclusive jurisdiction in the Exchange Act, the Federal Power Act, the Natural Gas Act, and the Hot Oil Act, and non-exclusive jurisdiction in the Securities Act, the former Public Utility Holding Companies Act, the Trust Indenture Act, the Investment Company Act, the Investment Advisers Act, the International Wheat Agreement Act, and the

Interstate Land Sales Full Disclosure Act. That language has the same meaning regardless of whether the jurisdiction it generates is exclusive. If the same type of allegations could not support concurrent jurisdiction under, say, the Securities Act, they cannot support exclusive jurisdiction under the Exchange Act.

Thus, in *Pan American Petroleum*, this Court expressly rejected the argument that the use of the word "exclusive" in the Natural Gas Act's jurisdictional grant was relevant to the scope of federal jurisdiction: "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." 366 U.S. at 664. The Court specifically cited decisions giving the patent jurisdictional statute the same scope as § 1331, *see id.*, and it applied the same principle to the Natural Gas Act's jurisdictional provision.[5]

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[5] Merrill Lynch's amici curiae the Natural Gas Supply Association and the Interstate Natural Gas Association of America appear to request that this Court indicate in its decision that the jurisdictional provision of the Natural Gas Act (and presumably that of the Federal Power Act) effectively confers exclusive jurisdiction over all state-law contract claims involving wholesale natural gas (and electricity) transactions subject to the jurisdiction of the Federal Energy Regulatory Commission, as all such cases in their view involve efforts to enforce liabilities created by federally approved tariffs or rate filings. That position is inconsistent with the holding in *Pan American*, and it confuses the question of jurisdiction with a merits defense that a state-law contract claim is preempted. The argument also suggests a view that the Natural Gas Act and Federal Power Act "completely preempt" (i.e., federalize) nominally state-law claims, which

(*Footnote continued*)

Merrill Lynch's policy arguments based on the need for uniform interpretation of federal law would not suffice to justify an expansive interpretation of the Exchange Act's grant of exclusive federal jurisdiction even if the statute were open to a construction different from that of similar provisions granting non-exclusive jurisdiction. This Court has consistently rejected arguments that state courts lack competence to decide important questions of federal law that arise in state-law based actions—or even, for that matter, in actions arising under federal law. *See, e.g.*, *Gunn*, 133 S. Ct. at 1067–68; *Pan Am. Petroleum*, 366 U.S. at 665–66; *Tafflin v. Levitt*, 493 U.S. 455, 464–67 (1990).

Indeed, this Court in *Gunn* did not perceive the need for uniformity to be a sufficient basis for an expanded view of exclusive federal jurisdiction even under the patent laws, where federal law occupies the field substantively and where the need for uniformity is such that Congress vested appellate review of federal patent cases entirely in a single court of appeals. Regulation of securities, by contrast, remains an area of shared state and federal substantive authority, *see Matsushita*, 516 U.S. at 382–83, and even within the federal court system, securities cases are vulnerable to the "inconsistency ... which a multi-membered, multi-tiered federal judicial system already creates." *Tafflin*, 493 U.S. at 465. The Exchange Act offers no

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would be an unusual result for statutes that themselves do not create federal rights of action that could completely preempt state-law ones. In any event, amici's far-reaching arguments concerning particular applications of the jurisdictional language at issue to very different types of actions under different schemes of substantive law are best reserved for a case in which they are presented.

more reason than the patent law at issue in *Gunn* to believe that Congress's desire for uniformity is not adequately served by the means it chose: exclusive jurisdiction over claims arising under federal law. *See Gunn*, 133 S. Ct. at 1067.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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